Supreme Court, U.S.
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No. 06-899

IN THE

Supreme Court of the United States

Fishing Vessel CHLOE Z,

Petitioner,

v.

ROBERT MATOS and SLOBODAN PRANJIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant their petition, where the Ninth Circuit found that timely filed *in rem* maritime claims remained pending after trials and judgments of the *in personam* actions and this finding does not conflict with a decision of this Court or a Court of Appeals and does not implicate an important federal question that has not been settled by this Court.

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Respondents Robert Matos and Slobodan Pranjic respectfully submit the following Brief in Opposition to the Petition for Writ of Certiorari filed by fishing vessel CHLOE Z.

INTRODUCTION

Petitioner has presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner failed to demonstrate that the Ninth Circuit's June 5, 2006 Memorandum conflicts with a decision of this Court or another Court of Appeals or that the Ninth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

Petitioner attempts to spin the facts to create the impression there is a conflict among the circuits, which requires this Court's attention. Its argument relies on authority which holds that prior actions (including letter notice, state court actions, etc.) do not relieve a plaintiff's burden to timely file a proper federal lawsuit. Petitioner attempts to argue the vessel here did not have notice of the claims against it until more than three years had passed

However, it is undisputed the two injured seamen here filed proper federal complaints well within three years of their injuries. The cases were thoroughly litigated including four trials before the district court, five decisions by the Ninth Circuit, one post-trial evidentiary hearing by the district court and this Writ of Certiorari. The injured seamen asserted claims against the vessel from the beginning of their legal odyssey, which now spans 14 years.

The real issue for Petitioner is the Ninth Circuit's finding the injured seamen's *in rem* claims against the vessel filed in 1994 were still pending in July 1996, when the *in personam* claims went to trial, and remained pending until ultimately ruled upon. That is not a proper basis to request this Court's intervention, it is not the question the petition presented and the Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In 1991 and 1992 Respondents were injured while working aboard Petitioner fishing vessel Chloe Z ("The CHLOE Z"). At the time of their injuries, both seamen were employed by The CHLOE Z Fishing Company, Inc. ("Fishing Company"), which owned the CHLOE Z. These facts are not in dispute.

In 1994, Respondents each filed a separate suit in the District Court of Guam which alleged *in personam* claims against the Fishing Company as well as *in rem* claims against the CHLOE Z. These lawsuits were both filed well within the three-year statute of limitations. These facts are also not in dispute and have been admitted numerous times by Petitioner, including in its petition before this Court.

After years of litigation, Respondents proceeded to trial on their *in personam* claims and obtained judgments against the Fishing Company in July and August, 1996. *See* Pet. App. 33a-36a. Fishing Company appealed both judgments against them. The district court judgments were affirmed by the Ninth Circuit and became final on November 6 and 7, 1997. *Pranjic v. CHLOE Z Fishing Company* 129 F.3d 127 (9th Cir. 1997) (table); *Matos v. CHLOE Z Fishing Company* 129 F.3d 126 (table) (9th Cir. 1997).

Importantly, Respondents' *in rem* claims were *not dismissed* prior to the July and August 1996 *in personam* trials. There is no dispute that as of July 1996 the *in rem* claims were pending and Respondents could have arrested the vessel. Although the district court was not entirely consistent on this point, in March 1997 the district court found the Respondents' *in rem* claims were pending. *See* Resp. App. 7a. The Respondents maintained they were still pending. Petitioner admitted the *in rem* claims were pending as of July 1996 and conceded this point before the Ninth Circuit. *See* CHLOE Z Response Brief at 16, 26-27 (9th Cir.) (No. 04-15948).

Following the conclusion of the *in personam* trials in July and August 1996, Respondents attempted to obtain service of process over the vessel CHLOE Z. However, that same month, the CHLOE Z's mortgage holder (TCW) filed a new *in rem* lawsuit against the vessel in the District Court of Guam and arrested it in case number CV-96-00055. Guam Local Rule 12 directed that any others with an interest in vessel proceeds were required to intervene in this action. Respondents moved to consolidate their timely filed 1994 lawsuits with TCW's new 1996 lawsuit. However, the district court denied that motion. (On appeal to the Ninth Circuit, Respondents argued this denial of the Motion to Consolidate was error, but after concluding the 1994 *in rem* lawsuits were still pending, the Ninth Circuit never reached this issue.) Shortly thereafter, Respondents moved to intervene in TCW's recently filed 1996 case. That motion was granted, and Respondents secured the arrest of the vessel.

Petitioner then attempted to prevent Respondents from securing an *in rem* attachment against the vessel. They urged the district court to vacate Respondents' warrant of arrest

and argued Respondents were attempting to pursue their *in rem* claims after the statute of limitations had run. In a March 5, 1997 order, the district court rejected Petitioner's argument that Respondents' *in rem* claims had lapsed:

> CHLOE Z's counsel also argues that since Pranjic and Matos failed to ever arrest the CHLOE Z (which was under arrest by several other creditors at the time), their original action against the vessel "lapsed" – that Pranjic and Matos never established jurisdiction over the vessel. However, they presented no legal authority that an *in rem* claim "lapses" for failure to serve. **The Court does not consider this claim to have lapsed.**

Resp. App. 7a (emphasis added).

The district court also rejected the CHLOE Z's argument that Respondents had relinquished their *in rem* claims based on an unsigned stipulation in the parties' July 3, 1995 pretrial conference order. The court referred to Local Rules of Practice with the District Court of Guam, Rule 120-3, that stipulations shall not be effective unless approved by the judge. Accordingly, the district court ruled that neither the court nor the parties were bound by the unsigned stipulation. *Id* at 8a.

After conducting trials on both Respondent's *in rem* claims, the district court then entered judgments in favor of Respondents and against Petitioner on January 11, 1999 and February 22, 1999. *See* Appellants Excerpts of Record – Volume I at 51, 61.

Petitioner again appealed and on remand from the Ninth Circuit, the district court vacated the judgments in favor of Respondents and entered judgments in favor of Petitioner. However, in this 2004 order, the district court continued to recognize that as of July 11, 1996, Respondents "could have sought to arrest the vessel." *See* Pet. App. 13a. Therefore, the district court continued to conclude, at least implicitly, that Respondents' *in rem* claims were still pending in July 1996, more than three years after the date of the injuries.

In the latest appeal, Petitioner aggressively argued to the Ninth Circuit that the Court and parties were *not* bound by the party's unsigned stipulation and the *in rem* claims were still pending in July 1996. *See* CHLOE Z Response Brief at 26-27 (9th Cir.) (No. 0415948).

In its brief, unpublished Memorandum at issue here, the Ninth Circuit agreed, finding the stipulations invalid. Since the *in rem* claims were still pending in July 1996 when Respondents' *in personam* claims came to trial and they did not merge with the *in personam* judgments, the Ninth Circuit concluded the Respondents' continued pursuit of the *in rem* claims did not run afoul of the statute of limitations. *See* Pet. App. 2a-3a. The dissent agreed that the question of whether Respondents voluntarily dismissed their claims against the CHLOE Z (although the CHLOE Z had already conceded in its brief to the Ninth Circuit the claims remained pending) had become essentially the dispositive issue in the case. *See* Pet. App. 4a (Reed, J. dissenting).

REASONS FOR DENYING THE PETITION

Petitioner is attempting to obtain Supreme Court review by claiming there is a conflict between the Ninth Circuit's Memorandum and several other Circuits. Petitioner attempts to make it appear that the Ninth Circuit's Memorandum in this case upsets the well-settled rule that a timely filed claim that is voluntarily dismissed does not toll the statute of limitations because it is as if the claim had never been filed.

However, in the case at bar, the Ninth Circuit's Memorandum is not in conflict with this well-established rule. This case has nothing to do with that rule (which is also well-accepted by the Ninth Circuit) because here, the Ninth Circuit found the original *in rem* claims were still pending. Therefore, the true issue for Petitioner is whether or not the Ninth Circuit was correct in finding these original *in rem* claims were still pending. However, this evidence-based factual finding does not create a conflict with other circuits and is not appropriate for review by this Court.

I. There is no conflict among the circuits because Respondents' timely filed 1994 *in rem* claims were never dismissed.

In an attempt to obtain Supreme Court review, Petitioner claims a conflict between the Ninth Circuit Memorandum of June 5, 2006 and four other circuits. However, based upon review of the authority relied upon, it is apparent the issues are very different. In three of the four alleged "circuit conflicts," the underlying timely filed action was later voluntarily dismissed. In the fourth alleged "circuit conflict," the timely filed claim did not even include an *in rem* cause of action, and in any event, the timely claim had been discontinued by the district court.

In the Fifth Circuit case of *Basco v. American General Insurance Company* 43 F.3d 964 (5th Cir. 1994), the one and a half page opinion repeatedly stated the plaintiff voluntarily dismissed his timely claim. There was no argument the timely filed claim was still pending at the time of the Fifth Circuit's decision. Here, the Ninth Circuit stated the original claim was still pending at the time of its decision upon which this appeal was taken.

In the First Circuit case of *McKinney v. Waterman Steam Ship Corporation* 925 F.2d 1 (1st Cir. 1991), the plaintiff dismissed his timely filed claim after he was notified a bankruptcy automatic stay was in effect at the time. However, after the bankruptcy stay was lifted, plaintiff waited more than two years to re-file his claim. Here, the Ninth Circuit specifically stated the *in rem* action in this matter was *never* dismissed.

The Eighth Circuit case of *Mamer v. Apex R.E. & T.* 59 F.3d 780 (8th Cir. 1995) was similar. There, the plaintiff voluntarily dismissed his timely filed claim, due to operation of the automatic stay in a bankruptcy action. Unfortunately, the plaintiff relied on a claims resolution procedure after the stay was lifted. In addition, the plaintiff waited 14 months after the failure of the claims resolution procedure to file another action in the district court.

Petitioner also argues the Third Circuit case of *Claussen v. Mene Grande Oil Company*, 275 F.2d 108 (3rd Cir. 1960) is applicable here. However, in *Claussen*, the prior, timely filed maritime claim was *in personam* only. As in the other cases cited by Petitioner, the timely filed claim was "discontinued" – this time, by the district court. *Id.* at 112.

In all four of the above-referenced cases on which Petitioner relies in an attempt to create a "circuit conflict" there was no evidence, or even argument, that the underlying timely filed claims were still pending. Here, the Ninth Circuit made a specific finding the *in rem* claims were still pending, not only after the *in personam* claims were tried to judgments, but still pending at the time the Ninth Circuit issued its Memorandum, upon which this appeal is taken.

II. The Ninth Circuit's fact-based determination that the 1994 *in rem* claims were still pending in 1996 creates no conflict among the circuits and does not merit a review by this Court.

In the Ninth Circuit's June 5, 2006 Memorandum, both the majority and dissent agreed the dispositive issue was the majority's finding the original *in rem* claims were not dismissed, but had remained pending, and thus were not subject to a statute of limitations bar. *See* Pet. App. 3a-4a.

The Ninth Circuit's ruling on this point was completely fact-based, set no new precedent and does not conflict with any of the decisions cited by Petitioner. Therefore, there is no basis for further review by this Court.

A. Petitioner conceded the *in rem* claims were still pending in July 1996.

Even if the correctness of the Ninth Circuit's fact-based finding that Respondents' *in rem* claims were still pending merited further review and was identified as the "question presented" to this Court, Petitioner waived its right to argue the matter based on numerous past concessions.

Counsel for Petitioner previously conceded several times that Respondents' *in rem* claims were still pending as of July 1996. In Petitioner's Ninth Circuit brief, it conceded this point at least three times as follows:

> "They **could have arrested the vessel before going to trial in the summer of 1996** in Guam cases 94-00013 and 94-00014 to timely pursue their *in rem* claims, but they did not do so.";
>
> Matos and Pranjic's "in rem claims in Guam cases 94-00013 and 94-00014 **were still pending when the *in personam* trials started.**";
>
> "The district court ruled on March 5, 1997, that the Court and parties were not bound by the unsigned stipulation because Judge Umpingco never signed it. (SER: 41-42, order, page 7-8). Thus, **the *in rem* claim [sic] was still pending in July 1996** when the *in personam* trials began."

See Petitioner CHLOE Z's Response Brief at 16, 26-27 (emphasis added). In addition, Petitioner's counsel conceded this point again in response to direct questioning by the Ninth Circuit panel during oral argument.[1]

Therefore, even if this issue did merit review by this Court, Petitioner waived its right to assert this argument and/ or conceded the *in rem* claims were still pending more than three years after the injuries.

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1. The complete audio file of this oral argument is on the 9th Circuit's web cite at: *www.ca9.uscourts.gov*. For convenience, portions of uncertified transcriptions are attached as Resp. App. 10a-16a.

B. The pending nature of the *in rem* claims did not change between July 1996 and December 1996.

The 1994 *in personam* trials began on July 15, 1996 (Pranjic) and July 23, 1996 (Matos). *See* Resp. App. 2a. Judgment was entered on those *in personam* claims on July 26 and August 19, 1996. *See* Pet. App. 33a-36a.

Respondents secured a warrant for arrest before the interlocutory sale of the vessel on December 3, 1996. Resp. App. 2a.

Therefore, in order for Petitioner's argument regarding the nature of the claims to make any logical sense, the *in rem* claims would have to have lapsed sometime between July 1996 and December 2, 1996. Petitioner cites no authority supporting this position.

Although the 1994 *in personam* claims proceeded to trial during that time, that event did not cause other claims against other defendants to terminate. As discussed above, the district court reached this conclusion in its order of March 4, 1997.

Furthermore, in December 1996, when the district court granted Respondents' Motion to Intervene and authorized *in rem* process, the *in personam* judgments entered in July and August 1996 were not even final because the Fishing Company appealed both of them to the Ninth Circuit. Both *in personam* cases were still on appeal before the Ninth Circuit when the district court entered its March 1997 order denying the CHLOE Z's Motion to Reconsider Respondents' *in rem* attachment.[2]

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2. The Ninth Circuit affirmed the *in personam* judgments for Pranjic and Matos in unpublished decisions on November 6 and 7, 1997, over eight months later. *Pranjic v. CHLOE Z Fishing Company, Inc.* 129 F.3d 127 (9th Cir. 1997) (table) *Matos v. CHLOE Z Fishing Co., Inc.*, 129 F.3d 126 (table) (9th Cir. 1997).

Although Petitioner strenuously argued that Respondents' *in rem* cases mysteriously "ended" between July and December of 1996, it was unable to cite any authority for that assertion. At the oral argument on March 17, 2006, the Ninth Circuit panel grilled Petitioner's counsel on this issue several times and repeatedly asked for authority to support that position. In response, Petitioner indicated the best authority for that assertion was the Ninth Circuit case of *Mann v. American Airlines* 324 F.3d 1088 (9th Cir., 2003). *See* the audio file on the Ninth Circuit's web cite at: *www.ca9.uscourts.gov.*

However, the *Mann* decision actually supports Respondents' position. The *Mann* decision reversed a district court's statute of limitations decision, based on plaintiff's failure to serve process within the 120-day period prescribed by federal civil procedural rules. The *Mann* court held that since the case was *filed* within the statute of limitations period, the district court had wide discretion to permit service later than the time indicated in civil procedure rules. That Court stated: "Once a Complaint is filed, the statute of limitations is tolled **unless and until the district court dismisses the action.** *See* 4 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil 3d § 1053 (3d ed. 2002).*" 324 F.3d at 1090 (emphasis added); *Pardazi v. Cullum Med. Ctr.*, 896 F.2d 1313, 1315-16 (11th Cir. 1990).

A suit for personal injury arising out of a maritime tort must be commenced within three years from the date the cause of action accrued. *See* 46 U.S.C. App. § 763a (2000). A civil action is commenced by filing a complaint with the court. Fed. R. Civ. P. 3; *see also Henderson v. United States*, 517 U.S. 654, 657 n.2 (1996) ("In a suit on a right created by

federal law, filing a complaint suffices to satisfy the statute of limitations.") Here, everyone agrees the injured seamen filed their *in rem* and *in personam* claims within the applicable three-year statute of limitations. There is no indication the district court dismissed the *in rem* claims by December 3, 1996. Conversely, in an Order dated March 5, 1997, the district court specifically stated Petitioner "presented no legal authority that an *in rem* claim 'lapses' for failure to serve. The Court does not consider this claim to have lapsed." *See* Resp. App. 7a.

C. The outcome of this case may be the same regardless of the Ninth Circuit's statute of limitations ruling.

Even if this Court granted review and rejected the Ninth Circuit's ruling on the statute of limitations, the outcome of this case could be the same. Given its disposition of the case, the Ninth Circuit did not reach Respondents' argument on appeal that the district court erred in denying Respondents' motions to consolidate the original 1994 *in rem* cases with the 1996 intervention action brought by TCW. Had the district court granted Respondents' motions to consolidate, the statute of limitations issue could have been avoided. Therefore, if this Court overturned the statute of limitations ruling, the Ninth Circuit would then have to reach the consolidation issue on remand, potentially leaving its ultimate disposition undisturbed. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 231 (8th ed. 2002) (certiorari may be denied if resolution of an issue is irrelevant to the ultimate outcome of the case).

III. Petitioner's policy arguments regarding uniformity favor denial of this petition.

A. The Ninth Circuit's evidence-based factual finding regarding the pending nature of the *in rem* claims has no effect on legal rules, computation of statutes of limitation or forum shopping.

Petitioner argues this Court's review is warranted in order to protect uniformity of rules applicable to maritime actions, predict the appropriate time for filing maritime tort claims and prevent forum shopping.

As discussed above, the Ninth Circuit did *not* create a new rule regarding tolling a statute of limitations. It simply found, in its brief, unpublished opinion, that the 1994 *in rem* claims were still pending. That determination, peculiar to the facts of this case, has no bearing on the broader operation of the statute of limitations for maritime torts. There is no benefit for any litigant to "forum shop" in the Ninth Circuit.

B. There is no conflict among the circuits regarding when a vessel must be arrested.

Petitioner conceded numerous times Respondents could have arrested the vessel more than three years after their injuries. Petitioner does not argue there is a statute of limitations requiring the *arrest* of a vessel within a certain period, and the scant case law discussing the timing of vessel arrest suggests otherwise.

In *Bermuda Express, NV v. M/V Litsa*, 872 F.2d 554 (3d Cir. 1989), for example, the Third Circuit indicated that a vessel arrest is a remedy of "last resort" and considered it a

"draconian measure." *Id.* at 559. In *Gammill v. Bradley T*, 879 F. Supp. 737 (W.D. Ky. 1995) a Kentucky district court relied on *Bermuda Express* and refused to establish a firm rule requiring a maritime lienor to arrest the vessel, particularly if there were other methods to obtain payment, such as by suit against the ship-owner. In *Chan v. Society Expeditions, Inc.* 1995 WL 694138 (W.D. Wash., 1995), the district court held a plaintiff need only commence an action against a vessel by filing an *in rem* claim against it during the statute of limitations period and was *not* required to serve the vessel with process by arresting it within the limitations period. Petitioner cites no conflict on this point that requires this Court's attention.

C. The vessel had extensive notice of the claims within three years of the injuries.

Petitioner briefly raises the issue of notice and appears to argue this result is unjust because the vessel did not have adequate notice to defend itself. However, over 45 years ago, this Court addressed the concept of distinguishing the vessel from its owner. In *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), this Court referred to the legal fiction of treating a vessel as a separate person as "archaic," "an animistic survival from remote times," and "irrational," refusing to apply the fiction "where its usefulness and possibilities for good [were] questionable at best." *Id.* at 23. Thus, the Court in *Continental Grain* allowed an *in rem* action to be transferred to the district where the *in personam* claims were pending, even though the *in rem* action could not originally have been brought in that district. In *Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904 (4th Cir. 1981), the Fourth Circuit likewise emphasized that the personification of a vessel "should not blind a court to reality." Since the

vessel has an important economic effect on the owner, the court recognized that "[i]t is the owner, therefore, who is entitled to adequate notice." *Id.* at 911; *see also Cargill B.V. v. S/S "Ocean Traveller"*, 726 F. Supp. 56, 61 (S.D.N.Y. 1989) (the legal purpose of the legal fiction underlying *in rem* liability "is to simplify the task of suit and collection against ship owners").[3]

In *Claussen v. Mene Grande Oil Company*, 275 F.2d 108 (3rd Cir. 1960), cited by Petitioner, the court analyzed whether laches barred an *in rem* unseaworthiness claim brought *nine years* after the cause of action accrued. That court considered several factors to determine if the notice provided in the timely filed *in personam* claim was adequate. The Third Circuit pointed out that defendant knew of the injury very soon after the event. In addition, counsel who represented an entirely different defendant (Gulf Oil Corporation) also represented the defendant who was the subject of that case at bar. That counsel and that defendant defended that suit which made it reasonable to infer the present defense counsel had fully examined the merits of the claim in preparation for the earlier suit. The Third Circuit pointed out all these facts weakened the claim of prejudice to the defendant.

Strikingly, the same facts were true here in Respondents' cases. Petitioner was very well aware of the injuries to Respondents Robert Matos and Slobodan Pranjic. Similar to the *Claussen* case, the defendant permitted maintenance and cure claims to be paid to these two injured seaman during their disability. In addition, counsel who represented

3. No third party lienholders are participating in this petition. However, lienholders received the constructive notice that can be achieved through seizure of a vessel when TCW arrested the CHLOE Z on July 5, 1996. (*See* Docket Sheet for Case No. 96-00055).

defendants in the prior, timely filed *in personam* cases, were the same trial counsel who represented Petitioner in the *in rem* unseaworthiness claims, which also proceeded to judgment after lengthy litigation and trial. *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1989) indicating notice for purposes of relation-back of an amendment adding new parties under Fed. R. Civ. P. will be imputed to a new defendant who shares counsel with the original defendant; *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 196 (3d Cir. 2001).

Here, the vessel was the primary asset of the Fishing Company owner and its source of revenue. The corporate owner and its counsel litigated the cases extensively over 14 years, including four trials in the district court, five appeals to the Ninth Circuit, one post-appellate evidentiary hearing before the district court and this petition to the Supreme Court of the United States. It is certainly a "legal fiction" to claim the vessel did not have an adequate opportunity to defend itself.

CONCLUSION

For the reasons set forth above, Respondents Robert Matos and Slobodan Pranjic request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE DISTRICT COURT OF GUAM, TERRITORY OF GUAM DATED MARCH 4, 1997 AND FILED MARCH 5, 1997

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

Civil Case No. 96-00055

TCW SPECIAL CREDITS,

Plaintiff,

vs.

FISHING VESSEL CHLOE Z, et al.,

Defendants,

JUAN BARANDIARAN, et al., and VJEKO MAZIC,

Plaintiffs-in-Intervention.

ORDER

This case is before the Court on the Chloe Z's Motion for Reconsideration of the Court's prior ruling which allowed Pranjic and Matos to secure an *in rem* attachment to the Chloe Z.

Procedural History:

Pranjic and Matos each filed suit for separate personal injuries sustained on the fishing vessel Chloe Z, in unrelated

incidents on different dates. Pranjic was injured in a November 25, 1991, fall from the Chloe Z. Matos was injured in successive injuries in July and August of 1992. Pranjic and Matos filed their Complaints in the District Court of Guam on March 11, 1994, under case numbers 94-00014 and 94-00013, respectively. Pranjic and Matos' counsel had previously filed the same Complaints in two different district courts before their case was filed in the District Court of Guam. See Scheduling Order Notes in Civil Case Nos. 94-00013 and 94-00014, where Attorney Melancon stated that the same cases had been dismissed by Chloe Z in District Courts in California and in Hawaii before they were filed here.

Further, after filing their Complaints, the Chloe Z failed to answer after being duly served, and defaults were entered on July 26, 1994. The Chloe Z finally appeared three months later, on October 14, 1994, and moved to set aside the entry of default. This Court set aside the defaults against the Chloe Z in both cases on December 13, 1994. The Chloe Z answered Pranjic and Matos' Complaints on December 22, 1994, nine months after Pranjic and Matos had filed their third Complaints against the Chloe Z.

The District Court was unable to accommodate the originally scheduled trial date, and the cases were unable to come to trial until July 15, 1996, for Pranjic and July 23, 1996, for Matos. After a jury trial, Pranjic secured a verdict of approximately $750,000 and Matos was awarded a verdict of approximately $1,250,000. These awards have not been paid.

Appendix A

Meanwhile, in the instant case, on July 5, 1996, just days before the trials of Pranjic and Matos, the Chloe Z was arrested by its ship mortgagee, TCW Special Credits ("TCW"), who is the plaintiff in this action. The vessel was never released. Eventually, the vessel was ordered to be sold at an interlocutory sale on October 17, 1996. The sale took place on December 3, 1996. TCW, the ship mortgagee, was the highest bidder at the public auction, and purchased the vessel for approximately $7 million. The Court confirmed the sale by Order of December 18, 1996.

Against this backdrop, Pranjic and Matos have attempted to collect on their judgments. However, the *in personam* defendant, the Chloe Z Fishing Company, was a single-asset corporation, and the single asset was sold to TCW. Immediately before the sale, Pranjic and Matos secured a warrant for the arrest of the Chloe Z for a maritime lien. The res having been sold, their warrant of arrest is now operable against the proceeds of the sale, the balance of which after payment of expenses is $6,464,611.55, now on deposit with the Clerk of Court.

In December of 1996, the Chloe Z, specially appearing pursuant to F.R.C.P. Supplemental Rule E(8), moved to Vacate *In Rem* Process of Pranjic and Matos as plaintiffs-in-intervention. The Chloe Z has made no other appearance in-this case. The interlocutory sale was never contested. This is the only matter which the Chloe Z has appeared to contest.

The Court denied the December 5, 1996, Motion to Vacate on December 13, 1996. A Motion for Reconsideration was filed on January 3, 1997, and argued on February 7, 1997.

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The Motion:

The Chloe Z urges this court to reconsider its ruling denying the motion to vacate warrant of arrest of the Chloe Z. Specifically, the Chloe Z argues that this court (1) was in error when it based its ruling on there being no insurance when in fact there is insurance; (2) was in error when it held that estoppel was applicable on the basis of reasonable reliance; and (3) was in error because the Court did not distinguish between *in rem* and *in personam* claims, allowing the plaintiffs to pursue *in rem* claims after the statute of limitations had run.

As to its first argument, the Court and counsel now have corrected information — there is insurance. The confusion over whether there was insurance is very relevant to this motion, because it is representative of the confusion that has emanated from the Chloe Z's defense of the Pranjic and Matos cases from their inception, discussed *infra*.

As to its second argument, the Court reiterates that it considers counsel's reliance to have been reasonable. In its December 13, 1996, Order, this Court ruled that the Chloe Z would be equitably estopped from asserting the statute of limitations as a defense. The Court stated:

> The Court further rules that the intervention was timely considering the ambiguous circumstances surrounding the collectability of the personal injury award in Civil Case Nos. 94-00013 and 94-00014, set forth *infra*.

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> The Court further rules that the statute of limitations does not form a bar to *in rem* process by Pranjic and Matos. While it is true that generally *in rem* actions based on a maritime tort are subject to a three-year statute of limitations, 46 U.S.C. §763a, the principle of equitable estoppel limits the Chloe Z's use of this argument.

Critical to the Court's prior ruling was the fact that Pranjic and Matos' counsel had established that plaintiffs' counsel, Ritter, had formed a good faith belief that the verdicts were to be collected out of insurance proceeds. In the initial period following the verdicts, Pranjic and Matos' counsel believed that there was no insurance at all. Later, it developed that the insurance policy was what is termed in the industry as a "pay-to-be-paid" policy. Under this policy, Pranjic and Matos will not recover unless they are able to get money from the Chloe Z, but the Chloe Z has been reduced to a fund in deposit in the District Court's registry.

In considering Pranjic and Matos' November 27, 1996, Motion for Warrant of Arrest, the December 5, Motion to Vacate Warrant, and this Motion for Reconsideration, it is critical to this Court's reasoning that both Pranjic and Matos are back at square one — they must each re-prove their allegations in the context of this admiralty case after five years of litigation in their underlying personal injury cases. The Chloe Z was already shown mercy in the setting aside of default by this Court in December of 1994, only to have the Chloe Z entirely liquidated in the two years that it took the plaintiffs to get to trial.

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In addition, the Court considered additional information presented by Pranjic and Matos' counsel in these three motions: During discovery in the civil cases, Pranjic and Matos' counsel requested a copy of the Chloe Z's insurance policy. It was never produced. In lieu of producing the policy, in ¶4 of the Rule 26 Disclosure Statement, the Chloe Z stated that the policy would be in effect if the defendants were found liable. The statement in lieu of policy did not say: if defendants pay, the insurance goes into effect; it said that if defendants are found liable, the insurance goes into effect. The Court finds that Ritter's Declaration, wherein he asserts that he believed, on the basis of routine pretrial discovery, that resort to *in rem* process against the vessel for satisfaction of the judgment would not be necessary, to be credible. Ritter also asserts that the Chloe Z's defense team made representations inducing his belief that the arrest of the Chloe Z would be unnecessary (because insurance would be available to cover a verdict). Ritter also entertained settlement offers from the Chloe Z's counsel. None of these assertions are directly contradicted by the Declarations of McMullen and Ledger, filed with this court on December 13, 1996. The Court finds that Pranjic and Matos' counsel's reliance was reasonable, and that Chloe Z's counsel intended to induce the reliance. The Chloe Z is enjoying the windfall of freedom from $2 million in judgments, after having received the Court's good grace in setting aside a default, after which the Chloe Z was able to protract the litigation for another two years. The Court will not facilitate further evasiveness.

Chloe Z's counsel also argues that since Pranjic and Matos failed to ever arrest the Chloe Z (which was under arrest by several other creditors at the time), their original

action against the vessel "lapsed" — that Pranjic and Matos never established jurisdiction over the vessel. However, they presented no legal authority that an *in rem* claim "lapses" for failure to serve. The Court does not consider this claim to have lapsed.

Finally, the Chloe Z argues that by virtue of the Pretrial Statement, Pranjic and Matos relinquished their *in rem* claim against the vessel Chloe Z. The Chloe Z references the "Joint Pretrial Statement of All Parties," filed in the Pranjic case on July 3, 1996, wherein it is stated, at ¶(k) "Claims against the vessel CHLOE Z, and defendants Tuna Clipper Services and Zee Enterprises, Inc. are hereby dismissed." However, under the Local Rules of Practice for the District Court of Guam, Stipulations are not binding unless accompanied by the Judge's signature:

> 120-3. stipulations.
>
> (a) Stipulations will be recognized as binding only when made in open court or filed in the cause. Written stipulations shall not be effective unless approved by the Judge.

The Stipulations referenced by the Chloe Z are not accompanied by a Judge's signature. The Court notes that the parties submitted a Pretrial Conference Order on July 12, 1996, in both cases. The Pretrial Conference order was not signed. It is counsel's responsibility to see that submitted documents are signed, if that party intends to later rely on that document. The Court is not bound by the July 3, 1996 stipulations, nor are the parties.

As to the Chloe Z's third argument, that the Court does not appreciate the difference between *in rem* and *in personam* claims, the Court reiterates that the statute of limitations was tolled by the filing of the actions, but even if it was not, the Chloe Z is equitably estopped from asserting the statute of limitations. The court understands full well the difference between *in rem* and *in personam* claims. The Court further understands that if established, Pranjic and Matos' claims could have priority over prior claimants. As the Chloe Z has lost its only asset, one wonders why the Chloe Z cares about the priority of claimants. It is not a factor in the Court's consideration of this motion.

Equitable estoppel is an equitable doctrine which may be invoked by the Court taking into account whatever factors as the Court determines are just. "A trial court has considerable discretion in determining the application of equitable estoppel." *Schick Service. Inc. v. Jones*, 173 F.2d 969 (9th Cir. 1949).

The Court applies the heightened standard of examination of the equities of this situation because Mssrs. Pranjic and Matos are wards of this Court. The Court may step in to protect their rights. "A long line of cases . . . describe seamen as 'wards of the court' needing special protections from potentially overreaching ship owners. See *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942)," *Fuller v. Golden Ace Fisheries*, 14 F.3d 1405 (9th Cir. 1994), where the Ninth Circuit quotes the noted Fifth Circuit case, containing the important language:

> Historically, seamen have enjoyed a special status in our judicial system. They enjoy this status

> because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. *Castillo v. Soiliada Maritime Corp.*, 937 F.2d 240 (5th Cir. 1991).

The Court will not revisit the motion to vacate Rule E(4) nor vacate the Rule E(4) arrest.

Accordingly, the Motion to Reconsider is DENIED.

DATED: March 4, 1997.

s/ John S. Unpingco
JOHN S. UNPINGCO
District Judge

APPENDIX B — EXCERPT FROM ORAL ARGUMENT BEFORE THE NINTH CIRCUIT, MARCH 17, 2006: (UNCERTIFIED TRANSCRIPTION BASED ON THE AUDIO FILE LOCATED ON THE NINTH CIRCUIT'S WEB CITE AT: www.ca9.uscourts.gov)

9th Circuit: **"What about it if that judgment that was entered ignored the tolling problem, doesn't deal with it at all?"**

Mr. Barcott: **"Well, there wouldn't have been anyway to deal with the tolling problem because the *in rem* claim which could have been perfected in July of 1996 was simply let go.** It was never pursued. What should have happened in July of 1996 when, not only was there no misrepresentation, plaintiffs' counsel were told very explicitly what would happen if they continued with their trial. They could have gone out and, as I colloquially put it, put a second set of handcuffs on that vessel. TCW arresting that vessel didn't prevent the plaintiff from arresting the vessel. You simply get your own arrest warrant and you now have two marshall stickers on that vessel, both of which have to be taken off before the vessel sails. That could have been done in July of 1996, they would have had their trial presumably in 1997, this litigation would have been over in 1998. Once they went to judgment, the claims they brought in that case were concluded, the tolling had ceased and they then filed the new claim and it is absolutely clear that TCW, by arresting this vessel, didn't start their statute of limitations up again. They were too late into that case. They were too late into that case the day it was filed."

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9th Circuit: "Let me understand your authority that they filed the *in rem* claim within the statute?"

Mr. Barcott: "Yes."

9th Circuit: **"Now, what is the authority that says they have to arrest the vessel to keep the claim alive?"**

Mr. Barcott: **"Your honor, I don't have that authority.** It is a concept of maritime law that you only obtain jurisdiction over a vessel, and I believe we mentioned this in our brief, you only obtain jurisdiction in an *in rem case by* arresting a vessel. Can I give your honor this citation to the case? With two minutes in my brief I probably could . . ."

9th Circuit: "Is it in the brief?"

Mr. Barcott: "I believe this is in the brief, . . ."

9th Circuit: "So you're saying no jurisdiction is acquired until it is arrested?"

Mr. Barcott: "That's correct and service is not perfected until it's arrested. That is precisely how you perfect service . . ."

9th Circuit: "Is that answering the question about when the statute of limitation is stopped?"

Mr. Barcott: "We're conceding a point on that that I think is beneficial to the plaintiffs. We think the statute of limitations continued to toll once the claim had been filed until they arrested the vessel and if they had arrested the vessel in 1996,

that would have been timely, even though . . ."

9th Circuit: "Why do they have to do it in 96?"

Mr. Barcott: "Well, they could have done it in 95, they could have done it in 94, but they had to . . ."

9th Circuit: "Why couldn't they have done it 99?"

Mr. Barcott: "Because the case that tolled, the 94 case, was done and it was done in August . . ."

9th Circuit: "No..." Mr. Barcott: . . . of 96 . . ."

9th Circuit: "No. Their case was their own *in rem* case that hasn't been decided."

Mr. Barcott: "Well, they had an *in personam* and an *in rem* case they filed in 94 . . ."

9th Circuit: "Yeah . . ."

Mr. Barcott: ". . . There was a final judgment entered in that case in 1996. That case was over . . ."

9th Circuit: "*In personam* . . ."

Mr. Barcott: ". . . and as originally pled *in rem* and any tolling to the *in rem* ended when the final judgment was entered and it was as if it never existed."

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9th Circuit: **"Well, how can you say it ended when it wasn't rendered *in rem* against the ship?"**

Mr. Barcott: **"They have been given the benefit of having filed in 94, Your Honor, and when that case is concluded, the benefit of having filed, but not perfected that they are given for the 94 filing is completed, it's . . ."**

9th Circuit: **"Well, what's the authority on that"?**

Mr. Barcott: **"It would be the *Mann* decision, Your Honor. *Mann v. American Airlines* . . ."**

9th Circuit: **"That's the one you were just discussing?"**

Mr. Barcott: "Yes."

9th Circuit: "Alright."

Mr. Barcott: "Yes."

9th Circuit: "Well, we'll look at that."

Mr. Barcott: "It is, I think, essential, so this concept that someone else can come in and arrest the vessel and divest them of the ability to do it . . . that someone else came in and arrested the vessel after the statute of limitations had run for them, except in the case that they had filed."

.....

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9th Circuit: "Could I ask you about another case?"

Mr. Barcott: "Of course."

9th Circuit: "*United States against 2,164 Watches More or Less.* Are you familiar with that?"

Mr. Barcott: "I believe, in fact, that is the case I was referring to in the brief, Your Honor, the *in rem* jurisdiction is perfected by the arrest or the seizure of the property."

9th Circuit: "Can I read that they have an imperfect or untimely service of process does not deprive the Court of subject matter jurisdiction in *in rem* actions."

Mr. Barcott: "And I would agree with that, your honor. There is no doubt that by 1996 in the other case, service of process would have been untimely under Rule 4. You have 120 days, that case has been pending for two years, but the Court can make exceptions to the 120-day requirement and had the vessel been arrested, had the marshall sticker been put on it, in that case, we would have been hard-pressed to argue no jurisdiction."

9th Circuit: "And then that Court goes on to say that the Court must extend the time for service if the plaintiff shows good cause for the delay."

Mr. Barcott: "Absolutely. Absolutely and in the other case, there is no doubt in my mind and no doubt in anyone's mind who would read the transcript of the proceedings below in that case if they had said in 1996, Judge Coughenour we

didn't arrest the vessel, but in light of what we have now been told, we think it is imperative that we do arrest the vessel, I have no doubt that that motion would have been granted and they would have been timely in that case . . ."

.....

9th Circuit: **"But what ended the original *in rem* claim?"**
Mr. Barcott: "I'm sorry Your Honor?"

9th Circuit: **"What ended the original *in rem* . . ."**

Mr. Barcott: **"Entry of a final judgment in that action ended the original *in personam* unperfected *in rem* claim.** That's not the case that's on appeal here, of course. This is another case filed by someone else that they tried to get in to. If this argument had taken place after an attempt to arrest in 1996, we'd be in a very different posture."

9th Circuit: "It is so central . . ." **"Where would we look into the judgment that you say ended the first *in rem* action?"**

Mr. Barcott: **"You would look in the excerpt of record, the judgments were entered in 1996 in August following the trial** by Judge Coughenour and I can tell you they're in the excerpt of record and with about ten seconds of looking..."

9th Circuit: "Is the judgment against the ship, as well as against the . . ."

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Mr. Barcott: "No it is not. The judgment is against the ship owner and that terminated that action and any tolling that would have benefited the plaintiff in that action . . ."

9th Circuit: **"How do we know it ended the *in rem* action then?"**

Mr. Barcott: "The *in rem* action is still going on, Your Honor. The *in rem* action is yet . . . the **second *in rem action*** . . ."

9th Circuit: **"No, the first one. How do we know when that ended?"**

Mr. Barcott: **"There is a final judgment** headed final judgment and it was brought on appeal to this Court . . ."

9th Circuit: **"But it's not on the *in rem* action. It's in the *in personam* action."**

Mr. Barcott: **"That's right and if you look at footnote three of the American Airlines case at the point where that case is ended, oh that's wrong, all tolling stops . . ."**